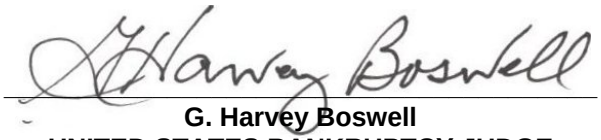
Dated: October 30, 2008
The following is SO ORDERED.



G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE	
J. Lyle Smith,	**CASE NO. 01-14168**
Debtor.	**Chapter 7**
First South Bank,	
Plaintiff,	
v.	**Adv. Pro. 02-5177**
John Hancock Financial Services, Inc.; B & H Investments, Inc.; Bancorpsouth Bank fka Milan Banking Company; Bank of Alamo; Bank of Jackson; First American Bank fka Amsouth Bank; First Bank fka Henderson County Bank and Bank of West Tennessee; First State Bank; First Tennessee Bank; Insouth Bank fka Brownsville Bank, Mckenzie Banking Co.; Merchants & Planters Bank; Sadler Management Group; Union Planters Bank N.A.; and J. Lyle Smith,	
Defendants.	

MEMORANDUM OPINION AND ORDER RE:
Motion for Trial by Jury by Defendants West Tennessee Mortgage Services, Inc., Sadler Management Group, Insouth Bank Fka Brownsville Bank and B & H Investments

Several, but not all, of the defendants in this matter filed a "Motion for Trial by Jury" on August 15, 2008. The filing parties were West Tennessee Mortgage Services, Inc., Sadler Management Group,

InSouth Bank fka Brownsville Bank and B & H Investments, Inc. John Hancock filed a response to this motion on September 2, 2008, in which it expressed its opposition to the motion for trial by jury. First Bank filed a "Response In Support of Defendants' . . . Motion for Trial by Jury" on October 1, 2008. The Court conducted a hearing on the motion for trial by jury on October 20, 2008. FED. R. BANKR. P. 9014. Resolution of this matter is a core proceeding. 28 U.S.C. § 157(b)(2). The Court has reviewed the testimony from the hearing and the record as a whole. This Memorandum Opinion and Order shall serve as the Court's findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

The issues in the case at bar have, in the words of Sir Paul McCartney, been on a long and winding road. Prior to filing for bankruptcy relief, J. Lyle Smith, ("Smith" or "Debtor"), was a John Hancock insurance agent who took out a number of variable life insurance policies on himself, his wife and his children with John Hancock. Over a period of several years, the debtor then assigned these policies as collateral for numerous loans with different lenders.

Smith filed a bankruptcy petition on September 14, 2001.[1] On May 31, 2002, First South Bank filed the instant adversary proceeding against the defendants asking the court for three forms of relief. First, First South Bank asked the Court to issue a declaratory judgment as to the priority of the various assignments made by Smith. Second, First South Bank sought a judgment against John Hancock for negligence in allegedly failing to notify subsequent assignees of other assignments on the same policy. Third, First South Bank sought a judgment against John Hancock for conversion for allegedly loaning the debtor money against the cash value of the policies even though John Hancock knew that the policies had already been assigned as collateral to third party creditors.

The various defendants in this matter filed cross-claims against John Hancock. First Bank, West Tennessee Mortgage Services and InSouth Bank filed cross claims against John Hancock on August 15, 2002 (docket # 42, 43, and 44). McKenzie Banking Company filed a cross claim against John Hancock, J. Lyle Smith, Regina Smith, Bradley Smith, Richard Smith and Julie Smith on October 2, 2002 (docket $ 61). West Tennessee Mortgage Services, as assignee of Sadler Management Group, filed a cross claim against John Hancock on October 28, 2002 (docket # 83). Merchants and Planters filed a cross claim against John Hancock, J. Lyle Smith, and Regina Smith on November 1, 2002 (docket # 98-100). John

[1]Smith originally filed his case under chapter 11 of the Bankruptcy Code, but converted to a chapter 7 case on December 11, 2002.

Hancock filed a cross-complaint against all the defendants and a counter-complaint for interpleader against First South Bank on November 12, 2002 (docket # 98 and 100).

Two of the defendants were voluntarily dismissed from this adversary proceeding on November 13, 2002: BancorpSouth Bank fka Milan Banking Company(docket # 88) and Amsouth Bank fka First American Bank (docket # 89). Several of the defendants entered into consent orders in which they agreed their interests in the John Hancock insurance policies were subordinate to either First South Bank or McKenzie Banking Co.: Bank of Alamo (docket # 186, entered April 28, 2003, interest in policy subordinate to First South Bank's interest in the policy); Bank of Jackson (docket # 237, entered August 2, 2005, interest in policy is subordinate to First South Bank's interest); First Tennessee Bank (docket # 148, entered December 5, 2002, interest in policy is subordinate to First South Bank); Merchants and Planters Bank (docket # 257, entered December 21, 2005, interest in policy is subordinate to First South Bank); Union Planters Bank (docket # 268, entered January 8, 2006, interest in policy is subordinate to McKenzie Banking Company). Three of the defendants entered into consent orders with John Hancock in which they waived their interests in various policies in favor of John Hancock and John Hancock in turn dismissed its cross claim against the defendant: Bank of Jackson (docket # 277, entered April 25, 2006); Merchants and Planters Bank (docket # 236, entered November 1, 2002) (Merchants and Planters also dismissed its cross claims against John Hancock, J. Lyle Smith and Regina Smith in this order); Union Planters (docket # 282, entered July 19, 2006) (Union Planters dismissed its cross claim against John Hancock in this order).

The Court conducted the first pre-trial conference in this matter on July 24, 2002. The pre-trial conference has been continued numerous times over the last six years with the latest conference being held on October 8, 2008. There is currently no scheduling order in effect in the case as several scheduling orders have long since expired. On request of the parties, one of the judges from the Western Division of the Western District of Tennessee Bankruptcy Court conducted a settlement conference in the matter on June 11 ,2008. No resolution was reached in that conference.

The law firm of Rainey, Kizer, Reviere and Bell, P.L.C. entered a notice of appearance on August 15, as counsel of record for West Tennessee Mortgage Services, Inc., Sadler Management Group, InSouth Bank fka Brownsville Bank and B & H Investments.[2] The original attorney for these entities,

[2] The notice of appearance was first filed on May 7, 2008, but the entry was voided due to a deficiency in the notice of appearance. The parties filed a corrected document on August 15, 2008, docket entry # 312.

David Riddick, was activated for National Guard duty in Iraq earlier this year. As a result, Charles Exum of Rainey, Kizer, Reviere and Bell stepped in as new counsel.

West Tennessee Mortgage Services, Inc., Sadler Management Group, InSouth Bank fka Brownsville Bank and B & H Investments, ("moving parties"), filed their "Motion for Trial by Jury" on August 15, 2008. In said motion, the moving parties stated four grounds in support of their motion. First, the moving parties alleged that the new counsel of record promptly filed the motion for a jury trial upon taking over representation of the moving parties. Second, the moving parties alleged that their claims for negligence are best suited to be heard by a jury. Third, the moving parties alleged that granting their motion for a jury trial will "in no way adversely affect the current status of this case." Although the adversary has been pending for over six years, the parties are not "substantially any closer to resolving the matter or being ready for trial than they were after the initial filing of the Adversary Complaint." Lastly, the moving parties alleged that John Hancock will not be prejudiced by granting the motion for a jury trial because John "Hancock has conducted little-to-no discovery in this matter."

John Hancock filed a response in opposition to the motion for a jury trial on September 2, 2008. In this response, John Hancock alleged that because the moving parties did not timely demand a jury trial in this matter, the Court has the discretion to either grant or deny the motion under FED. R. CIV. P. 39(b). In so doing, a court must weight several factors including:

> whether the case involves issues which are best tried to a jury;
> whether granting the motion would result in a disruption of the court's schedule or that of the adverse party;
> the degree of prejudice to the adverse party;
> the length of delay in having requested a jury trial; and
> the reason for the movant's tardiness in requesting a jury trial.

Docket entry #316, "Response of John Hancock Financial Services, Inc. in Opposition to The Defendants' Motion for Trial by Jury." In the case at bar, John Hancock alleged five reasons in support of their opposition to the motion. First, the issues in this case are ones allegedly best tried to a judge because the primary focus of the case is determining the "priority among competing assignees of life insurance policies issued by John Hancock and the value of the competing assignees' respective interests." Secondly, John Hancock alleged that granting the moving parties' request would disrupt both John Hancock's schedule as well as the Court's. Third, the moving defendants have been served with and responded to interrogatories, requests for production of documents and requests for admission by John Hancock. Fourth, the moving parties delayed in making the request for a jury trial by waiting over six years to file their request. Finally, the moving parties' late request for a jury trial is allegedly nothing

more than a claim of inadvertence. Relying on rulings from the Second and Third Circuits, John Hancock asserted that a mere substitution of counsel is not enough to justify the granting of a late filed request for a jury trial.

The moving parties in this case filed a response to John Hancock's response on September 24, 2008, docket # 318. In this response, the moving parties recognized the Second and Third Circuit rulings cited by John Hancock in their response; however the moving parties alleged that the Sixth Circuit has adopted a somewhat "broader rule that a court's discretion 'should be exercised in favor of granting a jury trial "in the absence of strong and compelling reasons to the contrary."'" Docket # 318 (citing *Kitchen v. Chippewa Valley Schools,* 825 F.2d 1004 (6th Cir. 1987). The moving parties also alleged that John Hancock has not provided any "strong and compelling reasons for why the Defendants' request for a jury trial should be denied." John Hancock has allegedly failed to provide proof of any prejudice that would result from the granting of the motion.

First Bank filed a "response in support of" the moving parties' motion on October 1, 2008, docket # 319. First Bank relied on the same caselaw and factors set forth by the moving parties in their response to John Hancock's reply.

II. CONCLUSIONS OF LAW

Federal Rule of Civil Procedure 38, made applicable to bankruptcy proceedings by FED. R. BANKR. P. 9015, states that "on any issue triable of right by a jury, a party may demand a jury trial by serving the other parties with a written demand. . . no later than 10 days after the last pleading directed to the issue is served;" FED. R. CIV. P. 38(b). If a party fails to make a demand within this time frame, the right to a jury trial is deemed waived. FED. R. CIV. P. 38(d), made applicable to bankruptcy proceedings by FED. R. BANKR. P. 9015; however, if a demand for a jury trial is not timely filed, "the court may, on motion, order a jury trial on any issue for which a jury might have been demanded." FED. R. CIV. P. 39(b), made applicable to bankruptcy proceedings by FED. R. BANKR. P. 9015.

In the Sixth Circuit, a "court has broad discretion in ruling on a Rule 39(b) motion." *Kitchen v. Chippewa Valley Schools,* 825 F.2d 1004, 1013 (6th Cir. 1987); *Misco, Inc. v. U.S. Steel Corp.,* 784 F.2d 198, 206 (6th Cir. 1986). "Moreover, the court's discretion should be exercised in favor of granting a jury trial where there are no compelling reasons to the contrary." *Moody v. Pepsi-Cola Metro. Bottling Co., Inc.,* 915 F.2d 201, 207 (6th Cir. 1990) (citing *Kitchen*, 825 F.2d at 1013). This proclivity to grant motions for a jury trial is based on the Seventh Amendment:

> The right to a jury trial is guaranteed by the Seventh Amendment and "occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury

> trial should be scrutinized with the utmost care." It becomes discretionary with the trial judge to grant a jury trial when the right has been waived by failure to make a demand. But even when exercising its discretion under Rule 39(b) of the Federal Rules of Civil Procedure, "the court should grant a jury trial in the absence of strong and compelling reasons to the contrary."

Local 783, Allied Indus. Workers of American, AFLCIO v. General Electric Co., 471 F.2d 751, 755 (6th Cir. 1973) (citations omitted); *see also, Kitchen*, 825 F.2d at 1013. In addition to the broad grant of discretion and the Seventh Amendment right to a jury trial, the Sixth Circuit has also recognized that "the lack of precedent for reversing the grant of a jury trial," and "the appellant's failure to convincingly show discernable prejudice" are grounds for granting of a motion for a jury trial. *Moody,* 915 F.2d at 207; *see also McDonough v. Memphis Radiological Prof'l. Corp.*, 2008 WL 4560674, *1 (W.D. Tenn. 2008).

In ruling on Rule 39(b) motions, courts should consider the factors set forth in *Parrott v. Wilson,* 707 F.2d 1262, 1267 (11th Cir. 1983):

1. Whether the case involves issues which are best tried to a jury;
2. Whether granting the motion would result in a disruption of the court's schedule or that of the adverse party;
3. The degree of prejudice to the adverse party;
4. The length of delay in having requested a jury trial; and
5. The reasons for the movant's tardiness in requesting a jury trial.

Coy/Superior Team v. BNFL, Inc., 2008 WL 2697368, *3 (E.D. Tenn. 2008) (citing *Moody*, 915 F.2d at 207). The Sixth Circuit has recognized that "a district court does not abuse its discretion by denying a 39(b) motion if the only justification for delay is 'mere inadvertence.'" *Kitchen*, 825 F.2d at 1013; however, this is a more liberal approach than other circuits which find that inadvertence alone "does not warrant a favorable exercise of discretion under Rule 39(b)." *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 356 (2nd Cir. 2007); *Kletzelman v. Capistrano Unified School Dist.,* 91 F.3d 68, 71 (9th Cir. 1996); *Daniel Intern. Corp. v. Fischbach & Moore, Inc.,* 916 F.2d 1061, 1066 (5th Cir. 1990). The majority of the cases in the Sixth Circuit which deal with inadvertence as the underlying reason for a late-filed demand involve cases in which the appellate court finds that a lower court did not abuse its discretion in *denying* a Rule 39(b) motion. *Andrews v. Columbia Gas Transmission Corp.,* 2008 WL 4527413 *11 (6th Cir. 2008) (affirming a magistrate's denial of a jury demand); *Kitchen,* 825 F.2d at 1013 (district court did not abuse its discretion in denying request for jury trial based solely on inadvertence); *Misco,* 784 F.2d at 205; *but see, Sewell v. Jefferson Co. Fiscal Court*, 863 F.2d 461, 466 (6th Cir. 1988) (finding that mere inadvertence could not "relieve the party from the effects of an

otherwise valid waiver of a jury trial." In that case, however, the plaintiff had knowingly waived her right to a jury trial in open court.)

The one case this Court could find which deals with the *granting* of a Rule 39(b) motion based on inadvertence, *Thompson v. Fritsch,* 172 F.R.D. 269 (E.D. Mich. 1997), held that inadvertence can serve as the basis for a Rule 39(b) motion. *Id.* at 270 ("Technical insistence upon imposing a penalty for failing to follow the demand procedure by denying a jury trial is not in the spirit of the Federal Rules." (citing 9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil 2d* § 2334, at 189 (1995)). In so ruling, the Court was offered cases from the Second and Ninth Circuits as support for denial of the motion. The *Thompson* court specifically pointed out that the Second and Ninth Circuits adhere to a much stricter standard in granting Rule 39(b) motions. *Id.* In the case at bar, the one case cited by John Hancock in its response to the moving party's motion for a jury trial, *Hester Indus., Inc., v. Tyson Foods, Inc.,* 160 F.R.D. 15, 18 (N.D.N.Y 1995) comes from the Second Circuit.

In the case at bar, the moving parties have asked the Court to grant their motion for a jury trial. Although the primary reason offered is that they had to retain new counsel, the Court finds that it is within its discretion to allow their motion to go forward. The parties did not engage new counsel out of a dissatisfaction with their prior counsel. Rather, they engaged new counsel because their previous attorney was activated for National Guard duty. Although courts in the Second and Third Circuits would not find this substitution sufficient to justify granting a late-filed demand, this Court finds that, when considered together with the *Parrott* factors, it can serve as the basis for the moving parties' demand.

Turning to the *Parrott* factors, granting the motion will not disrupt the Court's schedule or that of the adverse party. The Court has not set the matter for a final pre-trial conference, let alone a trial. Negligence and conversion are both actions which have traditionally been tried by juries. Additionally, the Court cannot find that John Hancock will be prejudiced in any significant way by granting the motion for a jury trial. Given the absence of a trial date in this matter as well as the amount of time this case has been pending, John Hancock conceivably has not completed most, if any, of its trial preparation. The Court also finds that there will be little prejudice to any of the parties in this matter by granting the motion for a jury trial. This adversary proceeding was filed in 2002. It has gone through a mediation with one of the other judges in our district and still the parties are no closer to a resolution of this case than they were in 2002. Any slight delay that will result from granting the motion will be slight. Lastly, John Hancock did not offer any significant proof to the Court of its alleged prejudice. Statements of prejudice without more cannot serve as a basis for denying a Rule 39(b) motion. *Kitchen,* 825 F.2d at

1013. ("Appellants have made only conclusory claims of prejudice and have failed to convince us that they were discernibly prejudiced by the jury trial on the state claim.").

Although the Court has found that the motion for a jury trial can be granted, the Court must now decide if it has jurisdiction to preside over the jury trial. Section 157(e) of Title 28 allows a bankruptcy court to conduct a jury trial if (1) the right to a jury trial applies to the proceeding, (2) the bankruptcy court has been specially designated to exercise such jurisdiction, and (3) all the parties consent. In the Western District of Tennessee, there is a District Court standing order which specially designates all bankruptcy judges in this district to conduct jury trials. *See* Standing Order 95-28. However, as with 28 U.S.C. § 157(e), the standing order requires the consent of all the parties to a jury trial. Because all of the parties in this case do not consent to a jury trial, this Court is without jurisdiction to conduct the trial. Pursuant to 28 U.S.C. § 157(d), the District Court may withdraw the reference of this case on its own motion or by timely motion of a party for "cause."

III. ORDER

It is therefore **ORDERED** that the "Motion for a Trial by Jury" filed by Defendants West Tennessee Mortgage Services, Inc., Sadler Management Group, Insouth Bank fka Brownsville Bank and B & H Investments, Inc., is **GRANTED.**

IT IS SO ORDERED.

Mailing List

J. Brandon McWherter, Attorney for First South Bank
Jerry Spore, Attorney for First South Bank
William Neal McBrayer, attorney for John Hancock Financial Services, Inc.
Charles Exum, attorney for B & H Investments, First American Bank, First Tennessee Bank, Insouth Bank, Sadler Management Group, West Tennessee Mortgage Services, Inc,
Stephen Hughes, attorney for BancorpSouth Bank, Bank of Alamo, McKenzie Banking Co.
C. Jerome Teel, attorney for Bank of Jackson
Harold Johnson, attorney for Merchants & Planters Bank
James Pentecost, attorney for Union Planters
William Mauldin, attorney for Union Planters
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